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Justices to Decide on Fairness in Drug Sentences

By ADAM LIPTAK

WASHINGTON — The Supreme Court on Monday agreed to resolve a question that has vexed the lower federal courts since Congress enacted a law to narrow the gap between sentences meted out for offenses involving two kinds of cocaine.

Selling cocaine in crack form used to subject offenders to sentences 100 times as long as those for selling it in powder form. The new law, the Fair Sentencing Act of 2010, reduced the disparity to 18 to 1, at least for people who committed their offenses after the law became effective on Aug. 3, 2010.

But what about people who committed their offenses before the statute came into force but were not sentenced until afterward?

For such defendants, Judge Terence T. Evans wrote in one of the pair of cases the Supreme Court agreed to hear, the law "might benefit from a slight name change: The Not Quite as Fair as it could be Sentencing Act of 2010 (NQFSA) would be a bit more descriptive."

The usual rule is that new laws do not apply retroactively unless Congress says so, Judge Evans wrote, and here Congress said nothing.

Edward Dorsey pleaded guilty in June 2010 to possessing 5.5 grams of crack cocaine in 2008 with the intent to distribute it. Under the law in effect at the time of his offense and his plea, and thanks to an earlier conviction, he was subject to a mandatory minimum sentence of 10 years. Under the new law, the mandatory sentence would not have come into play for fewer than 28 grams, and Mr. Dorsey would probably have received a sentence of three or four years.

Judge Evans, writing for a unanimous three-judge panel of the United States Court of Appeals for the Seventh Circuit, in Chicago, said Mr. Dorsey had "lost on a temporal roll of the cosmic dice" and was "sentenced under a structure which has now been recognized as unfair." But Judge Evans added that the courts were powerless to change things. A solution, he said, was up to Congress.

The Justice Department initially supported that view but later changed its position. The full Seventh Circuit in August declined to revisit the issue by a 5-to-5 vote.

"Thoughtful people might wonder what sense it makes for Congress, having decided that a 100-to-1 ratio is excessive, to leave the minimum and maximum sentences alone for persons whose crimes predate Aug. 3, 2010," Chief Judge Frank H. Easterbrook wrote in explaining why the full court declined to rehear four appeals presenting the issue. "It is a good question, to which there is no satisfactory answer other than the observation that legislation is an exercise in compromise."

A dissenting member of the full court, Judge Ann Claire Williams, asked a different question. "Why would Congress want sentencing judges to continue to impose sentences that it had already declared to be unfair?" she asked, adding, "There is no good answer to this question."

In a second dissent, Judge Richard A. Posner, said that requiring sentencing under the old law after the new one came into force was "perverse" and "gratuitously silly."

The case involving Mr. Dorsey is Dorsey v. United States, No. 11-5683. The Supreme Court also agreed to hear a companion case, Hill v. United States, No. 11-5721, and it consolidated the two for argument.

The second case involves Corey Hill, who was convicted in 2009 of selling 53 grams of crack cocaine in 2007. He was sentenced under the old law in December 2010, after the new one had come into force.

In the lower courts, the Justice Department successfully urged the imposition of the harsher sentence called for by the old law. In the Supreme Court, it reversed course, urging the justices to hear Mr. Hill's appeal and to rule in his favor.